Filed 4/30/03 In re M.J. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

In re M.J. et al., Persons Coming Under the Juvenile Court Law.	
CHILDREN'S SERVICES DIVISION, Plaintiff and Respondent, v. M.J., SR., Defendant and Appellant.	C040730 Super. Ct. Nos. J-24989 J-24990 J-24991

M.J., Sr., father of the minors (appellant), appeals from orders terminating his parental rights and freeing the minors for adoption. (Welf. & Inst. Code, § 366.26 [further undesignated statutory references are to this code].) Appellant contends he was denied due process at the section 388 hearing, during which the section 366.26 hearing was set, because he was not provided adequate notice of that hearing. He argues he is excused from having failed to file a writ petition challenging

the section 388 hearing proceeding because he did not receive adequate notice of his right to file the writ petition. Appellant also contends he was prevented from maintaining a relationship with the minors by the juvenile court's improper denial of visitation and that the termination order must be reversed because the juvenile court failed to consider the minors' wishes.

We conclude that, due to the insufficiency of the court's notice to appellant of his right to file a writ petition, appellant is excused from his failure to file a writ petition and may raise his current claims on appeal. We also conclude that the court's failure to ascertain appellant's permanent mailing address to which notice of the section 388 hearing could have been sent denied appellant due process. Thus, we shall reverse the orders of the juvenile court granting the section 388 petition for modification and subsequently terminating appellant's parental rights.

BACKGROUND

On April 9, 1997, petitions were filed on the three minors, three-year-old Q., and one-year-old twins, T. and M.J., alleging they were persons described by section 300, subdivision (b).[1] The petition alleged the parents had long-standing drug abuse

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[1] Petitions were also filed with regard to the minors' older four siblings, but this appeal does not concern those children.

problems, as well as problems with domestic violence and with providing shelter.

The children were ordered removed from the home and placed in relative foster care. The minors' mother died and appellant failed to reunify. A permanency planning hearing pursuant to section 366.26 was held on October 20, 1998, wherein the juvenile court adopted long-term foster care as the permanent plan but did not terminate appellant's parental rights.

Another section 366.26 hearing was held on July 10, 2000. The juvenile court found the minors adoptable and, without terminating appellant's parental rights, ordered a permanent plan of adoption. The juvenile court also denied appellant's request for visitation with the minors. Appellant's appeal from the July 10, 2000 order was the subject of an earlier appeal (case No. C036377).

In January 2001, the minors were placed in the home of their paternal great-aunt and uncle, who planned to adopt all three minors. Thereafter, these prospective adoptive parents became intimidated by appellant and decided against adoption.

On May 2, 2001, the court held another section 366.26 hearing wherein it determined that the minors were no longer adoptable and changed the permanent plan from adoption to long-term foster care. The minors, however, remained in their relative placement. The order again denied appellant's request for visitation with the minors. Appellant appealed the May 2,

2001 order, which was also the subject of an earlier appeal (case No. C038733).

On July 27, 2001, Children's Services Division (CSD) filed petitions for modification pursuant to section 388, requesting that a section 366.26 hearing be set in order to assess a new permanent plan for the minors and requesting out-of-county placement with prospective adoptive families be approved.

The court caused notice of the section 388 hearing to be sent via certified mail to appellant at his last known address. The notice was mailed by CSD. Appellant, however, was incarcerated and did not receive the notice. At the August 6, 2001 hearing on the section 388 petitions, appellant did not appear. The court confirmed that appellant had not provided anyone with a more current address and counsel for CSD informed the court that appellant was incarcerated. Although appellant's counsel had not been in recent contact with appellant, he questioned the adequacy of the notice, opposed the petitions for modification and requested an evidentiary hearing. Nevertheless, the court set a contested section 366.26 for November 5, 2001, and noted: "Inasmuch as [appellant] is not here, the Court will not continue the matter on the out of county placement. We could hear that today if we knew what his objection was."

Following the hearing, on the same date, the clerk of the court served, in each minor's case, copies of a notice of intent

to file writ petition form on the parties, including appellant. Appellant's copy was sent to the same last known address as the notice of the section 388 hearing. It does not appear in the record, however, that the clerk served a copy of the minute order or any other document that would reflect the date upon which the order setting the case for a section 366.26 hearing was made.

The CSD adoption assessment report for the section 366.26 hearing indicated that each of the minors had been in eight placements since the inception of these proceedings. The report opined that the prospective adoptive parents of Q., and the prospective adoptive parents of T. and M.J., each appeared suitable and committed as adoptive parents. The report concluded that adoption would be in the minors' best interests and was likely if the court terminated parental rights.

At the January 7, 2002 hearing, appellant testified that the last contact he had with the minors was at church on Easter Sunday in 2001. He stated he believed he had a connection with the minors and it would not be in their best interests to terminate his parental rights. He also believed the minors would benefit from continued contact with their other siblings and extended family members with whom they had a substantial relationship and, therefore, termination of parental rights would be detrimental. Appellant wanted the chance to make

amends and felt the minors would be better placed in guardianship or foster care.

The juvenile court found the minors were adoptable and found the benefits of adoption outweighed any detriments to the minors. The court terminated parental rights and this appeal followed.

DISCUSSION

I

We first address appellant's right to appeal. CSD does not contest appellant's right to challenge the order setting the section 366.26 hearing on appeal, even though he failed to file a petition for an extraordinary writ from the orders setting the section 366.26 hearing and modifying the minors' placement. "Where the court fails to give a party notice of writ review, the party's claims on appeal are not limited by the provisions of section 366.26, subdivision[s] (*l*)(1) and (*l*)(2)," which prohibit an appeal of the order setting the section 366.26 hearing and any associated issues where no timely petition for extraordinary writ review is first filed. (*In re Rashad B.* (1999) 76 Cal.App.4th 442, 448.)

California Rules of Court, rule 1436.5(d) provides: "When the court orders a hearing under section 366.26, the court shall advise orally all parties present, and by first class mail for parties not present, that if the party wishes to preserve any right to review on appeal of the order setting the hearing under

section 366.26, the party is required to seek an extraordinary writ by filing a Notice of Intent to File Writ Petition and Request for Record form (JV-820) or other notice of intent to file a writ petition and request for record and a Writ Petition -- Juvenile form (JV-825) or other petition for extraordinary writ. *Within 24 hours of the hearing, notice by first class mail shall be provided by the clerk of the court to the last known address of any party who is not present when the court orders the hearing under section 366.26.* Copies of Judicial Council form Writ Petition -- Juvenile (JV-825) and Judicial Council for Notice of Intent to File Writ Petition and Request for Record (JV-820) shall be available in the courtroom, *and shall accompany all mailed notices of the advice*." (Italics added; further references to rules are to the California Rules of Court.)

In this case, although the juvenile court mailed a Notice of Intent to File Writ Petition form to appellant, the record fails to establish that appellant was ever informed of the date upon which the section 366.26 was set (i.e., the "notice of the advice" regarding when the court has ordered a hearing under section 366.26). (See rule 1436.5(d).) As that information is critical for the calculation of time within which a notice of intent to file a writ petition must be filed, the record fails to establish that appellant received adequate notice of his right to pursue writ relief. Therefore, we agree with appellant

that he may proffer issues in this appeal that arose at the hearing at which the section 366.26 hearing was set. (§ 366.26, subd. (*l*)(3)(A); *In re Rashad B., supra,* 76 Cal.App.4th at pp. 447-448; *In re Cathina W.* (1998) 68 Cal.App.4th 716, 722.)

II

We can now turn to appellant's claim that he was denied due process at the section 388 hearing modifying the minors' placement and setting the matter for a section 366.26 hearing.

Section 388, subdivision (a) permits a parent or other person having an interest in the dependent child to petition for a hearing to modify or set aside any order of the court upon a change of circumstance or new evidence. Subdivision (c) of section 388 states in relevant part: "If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the persons and by the means prescribed by Section 386, and, in those instances in which the means of giving notice is not prescribed by those sections, then by means the court prescribes." (See also rule 1432(f).)

This notice is necessitated by due process: "Since the interest of a parent in the companionship, care, custody, and management of his children is a compelling one, ranked among the most basic of civil rights [citations], the state, before depriving a parent of this interest, must afford him adequate

notice and an opportunity to be heard." (*In re B. G.* (1974) 11 Cal.3d 679, 688-689.) "[The] total absence of notice in any form cannot comport with the requirements of due process." (*Id.* at p. 689.)

Appellant, however, did not receive notice of the section 388 hearing. CSD mailed the notice to his last known address but, at least by the time of the hearing, was aware that appellant was incarcerated and had not received the notice.

Had the juvenile court obtained a permanent mailing address from appellant pursuant to section 316.1 and rule 1412(*l*), notice of the hearing could have been sent to that address and properly effectuated the notice requirement.[2] The juvenile

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[2] Section 316.1 provides: "(a) Upon his or her appearance before the court, each parent or guardian shall designate for the court his or her permanent mailing address. The court shall advise each parent or guardian that the designated mailing address will be used by the court and the social services agency for notice purposes unless and until the parent or guardian notifies the court or the social services agency of a new mailing address in writing. [¶] (b) The Judicial Council may develop a form for the designation of a permanent mailing address by parents and guardians for use by the courts and social services agencies."

Rule 1412(*l*) provides in pertinent part: "At the first appearance by a parent . . . in proceedings under section 300 et seq., the court must order the parent . . . to provide a mailing address. [¶] (1) The court must advise the parent . . . that the mailing address provided will be used by the court, the clerk, and the social services agency for the purposes of notice of hearings and the mailing of all documents related to the proceedings. [¶] (2) The court must advise the parent . . . that until and unless the parent . . . or the attorney of record

court, however, never had appellant designate a permanent mailing address nor informed appellant that all notices would be sent to such address. Instead, the juvenile court merely obtained a current address, which was a prison address and clearly temporary. Although the juvenile court told appellant to keep counsel up to date with his address, it failed to substantially comply with section 316.1 and rule 1412(*l*). (*In re Rashad B., supra,* 76 Cal.App.4th at pp. 449-450.) Thus, the notice requirement for the section 388 hearing was not satisfied.

As appellant argues, the lack of notice of the hearing violated his constitutional right to due process. (Cf. *In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418.) Accordingly, the appropriate standard to apply in assessing prejudice from the constitutional violation is whether the error was harmless beyond a reasonable doubt. (*In re Laura H.* (1992) 8 Cal.App.4th 1689, 1696.) The task remaining, then, is to determine whether the lack of notice of the section 388 hearing to appellant was prejudicial.

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for the parent . . . submits written notification of a change of mailing address, the address provided will be used, and notice requirements will be satisfied by appropriate service at that address. [¶] (3) Judicial Council form *Notification of Mailing Address*(JV-140) is the preferred method of informing the court and the social services agency of the mailing address of the parent . . . and change of mailing address. [¶] (A) The form must be delivered to the parent . . . with the petition."

Appellant's counsel objected to the minors' removal from the home of their great-aunt and uncle to two separate out-of-county placements. As acknowledged by the juvenile court, however, appellant's absence from the hearing made it impossible to know precisely upon what grounds his objections were based. He claims now that he would have contended that the best interests of the minors would not be served by the modification, as the minors were thriving in the home of their great-aunt and uncle, they were enjoying ongoing contact with each other, their siblings and their extended family, and that their relative placement afforded a greater opportunity to restore a relationship between the minors and appellant. Under these circumstances, we cannot say that the juvenile court's failure to allow appellant to participate in the hearing on the section 388 petition was harmless.

In *In re Johnny M.* (1991) 229 Cal.App.3d 181, 189-191 (*Johnny M.*), the appellate court declined to apply a prejudice analysis where the juvenile court denied the mother a contested permanency planning hearing under former section 366.25 because it erroneously believed the hearing had already taken place. (*Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377, 1386 (*Andrea L.*).) The court in *Andrea L.* noted: "As a result of the juvenile court's erroneous legal ruling [in *Johnny M.*], the mother did not have occasion to make an offer of proof as to the

evidence she might have adduced at a contested hearing. Thus, a harmless error analysis could not be undertaken." (*Ibid*.)

Thus, *in Johnny M., supra*, 229 Cal.App.3d 181, because the mother had no occasion to make an offer of proof, the appellate court "did not, and could not on the record presented there, undertake to determine the probability of a different result had a contested hearing been held." (*Andrea L., supra,* 64 Cal.App.4th at p. 1386.) Likewise, in this case, because appellant was not afforded the opportunity to participate in the hearing and disputes the primary basis for CSD's petition, we cannot determine the probability of a different result had a contested hearing been held. Other than the fact that prospective adoptive families had been located out of county, there was no evidence before the juvenile court by which we can predict that the minors' removal from the home of their great-aunt and uncle to two separate out-of-county placements would have been ordered regardless of any evidence or argument appellant might have presented at a hearing.

The parties also devote much of their briefs to whether or not appellant was entitled to a hearing on the section 388 petition. Clearly he was. The only basis for granting a section 388 petition without a hearing is "[i]f all parties stipulate to the requested modification." (Rule 1432(d).) Otherwise, the court is required to set a hearing on the petition "[i]f it appears to the court that the requested

modification will be contested" (*ibid.*), in which case notice and a copy of the petition must be served on the parent. (Rules 1407(a)(5), 1407(d), 1407(e)(3), 1432(d), 1432(e); see also *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414.) Here, the parties did not stipulate to the modification. Thus, appellant had a statutory right to a hearing before the juvenile court could grant the petition *and* to notice of that hearing. (§§ 386, 388; rules 1407, 1432(d) & (e).)

We are cognizant that "each delay in reaching a permanent plan 'can be a lifetime to a young child.' [Citation.]" (*In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1801.) On the other hand, "[d]ependency proceedings are not simply a conveyor belt leading to the termination of parental rights." (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 676.) Consequently, reversal under the circumstances presented here is required.

Although this matter is being reversed, we briefly address appellant's remaining contentions. With respect to appellant's contention that he was improperly prevented from maintaining a beneficial relationship with the minors, we note that we resolved this contention in appellant's previous appeals (case Nos. C036377 and C038733), which were determined during the pendency of this appeal.

With respect to appellant's contention that the juvenile court was required to receive and consider the minors' current wishes regarding the permanent plan at the section 366.26

hearing, this contention was waived because of appellant's failure to raise this issue below. (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 819-820; see also *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338-1339.)

Moreover, section 366.26, subdivision (h), requires the court at the selection and implementation hearing to consider the minors' wishes only to the extent ascertainable. (*In re Amanda D., supra,* 55 Cal.App.4th at p. 820.) In this case, the juvenile court had significant information in the record indicating the minors' feelings about appellant, including information that the minors' feared him and that Q. believed he had killed her mother. Further, the adoption assessment did address the minors' attitude toward their placement and adoption as follows: "The children have little or no concept of permanence and adoption. Q. has stated that she wants to have a family of her own, and occasionally she had said that she would like to be placed with a family of her own without M.J. and T." The assessment explained that the minors' inability to understand the concept of permanence was both because of their tender years and the fact they had never experienced it. (See *In re Juan H.* (1992) 11 Cal.App.4th 169, 173 [a child may be too young or not have the capacity to understand the concept of adoption].) Because appellant did not challenge this aspect of the assessment report, the juvenile court properly relied on

CSD's opinion that the minors were unable to understand the concept of permanence. (*Ibid.*)[3]

DISPOSITION

The orders of the juvenile court granting CSD's petition for modification and terminating appellant's parental rights are reversed. The matter is remanded for a new hearing on the section 388 petition to allow appellant to present evidence regarding the propriety of the minors' placement in the out-of-county homes. If, after the new hearing on the section 388 petition, the juvenile court grants CSD's petition for modification, then the juvenile court shall reinstate the orders terminating parental rights without conducting a new evidentiary

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[3] Appellant's argument is unavailing that he was rendered ineffective assistance of counsel because his attorney failed to raise the failure to adequately secure and consider the minors' wishes. When a claim of ineffectiveness is made on appeal, and the record sheds no light on why counsel failed to act in the manner challenged, the case is affirmed "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." (*People v. Pope* (1979) 23 Cal.3d 412, 426; see *People v. Fosselman* (1983) 33 Cal.3d 572, 581.) Here, the information about the minors' wishes available to counsel as set forth above support counsel's tactical decision not to pursue the matter further.

hearing pursuant to section 366.26. The minors shall not be moved from their current placement absent juvenile court order.

MORRISON, J.

I concur:

RAYE, J.

SCOTLAND, P.J.

I agree that the juvenile court erred in failing to provide the minors' father with adequate notice of the section 388 hearing. But for reasons that follow, I conclude the error does not require reversal of the judgment terminating the father's parental rights.

In a nutshell, although the father appeared and testified at the section 366.26 hearing at which his parental rights were terminated, the majority reverses the judgment because, if the father had appeared at the earlier section 388 hearing, he might have convinced the court not to set a section 366.26 hearing. In my colleagues' view, the father might have "contended that the best interests of the minors would not be served by the modification, as the minors were thriving in the home of their great-aunt and uncle, they were enjoying ongoing contact with each other, their siblings and their extended family, and . . . their relative placement afforded a greater opportunity to restore a relationship between the minors and appellant."

However, in my view, the record unequivocally shows that, **because of the father's misconduct**, the minors were **not** thriving in the home of their great-aunt and uncle; the children were **not** enjoying a positive relationship with their extended family; and there was **no** relationship to restore between the father and the minors, who were afraid of him. I begin by summarizing the facts and procedural background in this case.

I

In May 1997, M.J., T., and Q. (the minors) were found to be dependent children and removed from parental custody because they had suffered, or were at substantial risk of suffering, serious physical harm or illness due to their parents' mental illness or substance abuse. (Welf. & Inst. Code, § 300, subd. (b); further section references are to this code.)

In particular, the juvenile court found that the parents had "long standing [*sic*] abuse problems which periodically render[] them unable to provide suitable care [for the minors]"; the mother tested positive for methamphetamine while pregnant with a sibling and admitted abusing the drug for a long time; the mother failed to consistently provide adequate shelter for the minors; after fighting with neighbors while she was under the influence of drugs, the mother was arrested on a warrant for child endangerment; the father had an extensive criminal history involving violence and the use of illegal substances; and the father engaged in domestic violence against the mother, which resulted in his arrest and incarceration.

Prior to the six-month review, the mother died "due to unknown reasons." For assaulting the mother prior to her death, the father was "incarcerated with no possibility of . . . being out of prison for at least four and one half years."

While he was in prison, it "was suggested to [the father] numerous times to participate in whatever minimal programs were available to him inside the jail and . . . [he] had not done anything to comply with [the service plan ordered by the court]."

Accordingly, the court terminated services and scheduled a section 366.26 hearing.

The Legislature has concluded that adoption is the preferred plan for a dependent child who cannot be returned to a parent. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) However, at a section 366.26 hearing in October 1998, adoption was not chosen as the plan because the minor's maternal aunt, Debra Smith, with whom the minors were placed, was unable to provide a stable home for the minors. Smith had been living in a residence with her two adult daughters and their children, and the minors were sleeping on two small couches in that home. Smith then moved to another residence, but had only "a double mattress, without bedding, for the 3 children to sleep on" and failed to provide adequate care for the minors. According to the social worker, "Smith's difficulties in acquiring and maintaining a stable and healthy home environment, as well as her neglect of the minors' health, educational, physical and emotional needs preclude at this time a permanent plan other than continuing foster care."

In April 1999, it was determined that the placement no longer was appropriate, in part because the maternal aunt was now abusing drugs, had health problems, and was failing to maintain a safe and healthy home environment. After temporary placement in the foster homes of Betty Autagne and then Diane Collins, T. and M.J. were placed with Barbara Weathersby, and Q. was placed in the foster home of Mary Simpson. Q., "a withdrawn, lonely and depressed little girl" was then moved to the home of Sheila and John Moore, who

wanted to adopt the three children. In March 2000, the three minors were placed in yet another foster home, that of Gaynel Phillips.

In May 2000, the social worker opined that the minors were now adoptable and that their "need for the stability and security of permanent adoptive family relationships far outweigh the value of any future contact [their] father might maintain." The social worker observed that the "nature of the relationship between T[.] and M[.J.] and their father is insignificant: they have been in foster care since one-and-one-half and they don't even talk about him. Q[.] has some frightening memories of her father and recently told her foster mother that she watched her daddy kill her mommy."

In or about January 2001, the minors were placed in the home of their paternal great-aunt and uncle, who wanted to adopt them. Unfortunately, the father -- who was released from prison in March 2001 -- "intimidated the family to the point they could no longer care for the children safely and comfortably."

Due to this change of circumstances, the juvenile court modified the plan in May 2001, from adoption to long-term foster care. The children were then moved to a temporary foster placement.

Because the children appeared to be adoptable, section 388 motions were filed in July 2001, to modify the plan to authorize out-of-county placement with prospective adoptive families and to schedule a section 366.26 hearing. Although the father was not given proper notice, and thus was not present at the section 388 hearing in August 2001, the juvenile court modified the plan as

requested and set a section 366.26 hearing. The children were moved to the new prospective adoptive homes in September 2001.

An adoptive assessment prepared for the section 366.26 hearing identified two adoptive families. For Q., the prospective adoptive father was 40 years old, with 16 years of education, who worked as a telecommunications manager; the prospective adoptive mother was 45 years old, with 14 years of education, who held a teaching certificate in early childhood education and who worked part-time for a school district as a secretary. For M.J. and T., the prospective adoptive father was 40 years old, with 14 years of education, who worked as a management services technician for the State of California; the prospective adoptive mother was 41 years old, with post-graduate level education, who works part-time in "a private counseling practice." The social worker's report noted that, although the minors had "little or no concept of permanence and adoption," Q. stated that "she wants to have a family of her own, and occasionally she had said that she would like to be placed with a family of her own without M[.J.] and T[.]." As for a relationship with their father, those closest to the children reported that the minors were "extremely terrified" of him.

The father appeared and testified at the section 366.26 hearing in January 2002. According to the father, during his last visitation with the minors in April 2001, (1) M.J. clutched onto him and demonstrated that it was important to keep father as a person in M.J.'s life; (2) T. told him she loved him but was "kind of stand-offish"; and (3) Q. wanted all the minors and father to stay together. Father believed that it was not in the minors' best

interest to terminate his parental rights because he is "their flesh and blood" and, although he had "made mistakes in the past," the minors would benefit from maintaining a relationship with him as part of their extended family. In father's words, "ain't nobody going to love my children the way I love them."

In terminating the father's parental rights, the trial judge stated: "[I] find[] by clear and convincing evidence that these children are adoptable. . . . [¶] [Thus,] I must terminate the parental rights of the [father] unless it has been shown to me a compelling reason that . . . termination would be detrimental to the children. And we heard lots of testimony about the detriment to [the father], and how he should be allowed to prove himself to these children. I heard very little testimony about how this would benefit the children other than to know who their father is. . . . [¶] So I'm weighing the relative benefits and detriments to these children. I think that the fact that they are going to be adopted far outweighs any kind of relationship that they might have with [their father], who by his own admission has been in and out of the children's lives, been in and out of the prison system just as this case has been pending here."

II

Despite the fact that the father appeared and testified at the section 366.26 hearing at which his parental rights were terminated, the majority reverses the judgment because the father did not have notice of, and did not appear at, the section 388 hearing at which the court modified the plan to authorize out-of-county placement

with prospective adoptive families and to schedule a section 366.26 hearing.

My colleagues reason that, if the father had attended the hearing, he might have "contended that the best interests of the minors would not be served by the modification, as the minors were thriving in the home of their great-aunt and uncle, they were enjoying ongoing contact with each other, their siblings and their extended family, and . . . their relative placement afforded a greater opportunity to restore a relationship between the minors and appellant." Thus, they conclude it cannot be said that the lack of notice was harmless beyond a reasonable doubt. (See *In re Laura H.* (1992) 8 Cal.App.4th 1689, 1696 [error subject to beyond reasonable doubt standard of prejudice].)

In my view, there is no doubt that the father would not have obtained a more favorable ruling if he had appeared and testified at the section 388 hearing.

For starters, the record demonstrates the minors were **not** thriving in the home of their great-aunt and uncle, and it was **the father's fault** that this placement was failing. "The family was planning to adopt their great nieces and nephew. . . . Unfortunately, when the birth father was recently released from prison, he created dissent among the children's large extended family, and through intimidation caused the prospective adoptive parents to decide against adoption of the children." In particular, "[t]he birth father has engaged in a pattern of aggressive intimidation involving unwanted contact with the children. He has shown up at the family's church, and the children's aunt feels

uneasy in allowing the children to play outside in their yard due to fear that the birth father will come by and try to engage the children, or coerce the children into his car." In the words of the social worker, the father "sabotaged the potential permanent home, stable and secure future of his children." Thus, the great-aunt and uncle "agreed to keep the children in their home [but only] until an appropriate adoptive family is identified."

And the minors were **not** enjoying a positive relationship with their extended family. As pointed out in a report filed prior to the section 388 hearing, "[t]he relatives have felt intimated by [the father, and] [o]ther extended family members, who previously supported the relatives adopting the children, appear to no longer support the plan either. . . . [T]here is no one to assume guardianship . . . ."

Moreover, as the record unequivocally demonstrates, there was **no** relationship to restore between the father and the minors, who were afraid of him.

Therefore, at the section 388 hearing, the juvenile court was faced with the choice of (1) placing the minors with prospective adoptive families and scheduling a section 366.26 to consider the preferred plan of adoption (*In re Autumn H., supra*, 27 Cal.App.4th at p. 573), in order to give stability to the minors who by then had already been in seven foster placements and **no longer could be placed with relatives due to intimidation by the father**, or (2) forsaking such potential stability in order to maintain a relationship between the minors and their father, **who had assaulted their mother while the minors were in her care, who had abused**

drugs, and who had intimidated the minors' extended family in order to sabotage the attempt of relatives to adopt the minors.

The choice was simple, and the choice was clear. In light of the history of this case, nothing the father could have said at the section 388 hearing would have changed the result, as reflected by the court's rejection of the father's hollow, self-serving testimony at the ensuing section 366.26 hearing.

Accordingly, the error was harmless. Reversing and remanding for further proceedings will only delay the inevitable--and perhaps jeopardize the only real chance of stability and safety that these minors have. I would affirm the orders terminating the father's parental rights and freeing the minors for adoption.

SCOTLAND, P.J.